(3)

No. 89-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

R. EUGENE PINCHAM,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD AND ITS MEMBERS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS THE ILLINOIS JUDICIAL INQUIRY BOARD AND ITS MEMBERS IN OPPOSITION

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33 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit properly held that the district court must abstain from exercising jurisdiction over petitioner's complaint in deference to state judicial disciplinary proceedings under the principles of federalism and comity established by this Court in *Younger v. Harris*, 401 U.S. 37 (1971) and *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), where the state judicial disciplinary proceedings were on-going, implicated important state interests, and provided the petitioner with an adequate opportunity to raise his constitutional challenges.

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit and before this Court are: petitioner, R. Eugene Pincham; and the respondents, the Illinois Judicial Inquiry Board and its members: Tyrone C. Fahner, chairman, William A. O'Conner, vice chairman, Honorable Harold L. Jensen, Honorable Edward H. Marsalek, Mary Sue Hub, Joel D. Gingass, Patrick F. Mudron, Joyce E. Moran, and Frances K. Zemans; Ray F. Breen, Executive Director of the Illinois Judicial Inquiry Board; and the Illinois Courts Commission and its members which are defendants: Honorable Ben K. Miller, chairman, Honorable Allan L. Stouder, and Honorable Rodney A. Scott.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Respondents the Illinois Judicial Inquiry Board and its members, Tyrone C. Fahner, chairman; William A. O'Conner, vice chairman; Honorable Harold L. Jensen; Honorable Edward H. Marsalek; Mary Sue Hub; Joel D. Gingass; Patrick F. Mudron; Joyce E. Moran; Frances K. Zemans; and Ray F. Breen, executive director, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-captioned proceeding on April 27, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 872 F.2d 1314. The memorandum opinion and order of the United States District Court for the Northern District of Illinois (Rovner, J.) appears at 681 F. Supp. 1309.

JURISDICTION

The Seventh Circuit issued its decision on April 27, 1989 and denied a timely-filed Petition for Rehearing with Suggestion for Rehearing in Banc on May 22, 1989. Jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the fourteenth amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, §15 of the Illinois Constitution of 1970 provides, in pertinent part:

> (b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.
>
> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.
>
> . . . .
>
> (e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority

after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

Illinois Supreme Court Rule 61, Ill. Rev. Stat. ch. 110A, ¶61 (1987), provides in pertinent part:

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Illinois Supreme Court Rule 62, Ill. Rev. Stat. ch. 110A, ¶62 (1987), provides:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to

> advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Illinois Supreme Court Rule 67(A)(2) and (A)(4), Ill. Rev. Stat. ch. 110A, ¶67(A)(2) and (A)(4) (1987), provides:

> A Judge Should Refrain From Political Activity Inappropriate to His Judicial Office
>
> A. Political Conduct in General
>
> . . .
>
> (2) A judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions.
>
> . . .
>
> (4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

STATEMENT OF THE CASE

This is a classic *Younger* abstention case. The Seventh Circuit correctly affirmed the district court's refusal to enjoin ongoing state judicial disciplinary proceedings in which Petitioner had an opportunity to raise his constitutional claims.

The Illinois Constitution of 1970 created a comprehensive system of judicial discipline by establishing the Illinois Judicial Inquiry Board and the Illinois Courts Commission. The Judicial Inquiry Board consists of two state circuit court judges, three lawyers, and four non-lawyers. Ill. Const. art. VI, §15(b). The Board has authority to conduct investigations, receive or initiate complaints concerning a state court judge or associate judge, and file complaints with the Courts Commission. *Id.* §15(c). The Board can file a complaint only after five of its members find that a reasonable basis exists: (1) to charge the judge with willful misconduct in office, persistent

failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute; or (2) to charge that the judge is physically or mentally unable to perform his duties. *Id.*

The Courts Commission is composed of a justice of the Illinois Supreme Court, two justices of the Illinois Appellate Court, and two Illinois Circuit Court judges. *Id.* §15(e). The Commission has the authority to discipline judges after notice and public hearing and upon the concurrence of three of the five members of the Commission that the charges have been proven by clear and convincing evidence. *Id.* 15(e), (f).

Petitioner, R. Eugene Pincham, is a justice of the Illinois Appellate Court, First District. On January 31, 1987, Petitioner delivered what he terms "an unwritten contemporaneous speech commemorating Black History in America," at an Operation P.U.S.H. Saturday Forum. Operation P.U.S.H. is a Chicago-based organization that advocates civil rights. The January 31, 1987 Saturday Forum, at which Petitioner was the Keynote Speaker, focused on the re-election of Harold Washington as mayor of Chicago.

During his speech, Petitioner referred to blacks and whites who were hanged in a slave rebellion in New York in 1741 and stated that "we are here on the shoulders" of those who died in that rebellion. In the last part of his speech, Petitioner applied this theme to black mayoral candidates, stating that "the black leaders are our candidates and they ride on our shoulders." After enumerating a list of these candidates, Petitioner focused on the 1987 Chicago mayoral election, stating:

> Harold Washington is running for mayor of the City of Chicago. He got here on our shoulders. You've got to decide here and now whether or not your shoulders are broad enough to carry him in another time.
>
> . . .
>
> And those of us who might be inclined to be traitors — you see, there are some who have slave mentalities — those of us who are inclined to be traitors, who suspect that because you are going to the secrecy of a voting

> booth, that you can vote for who you want to vote for, we know who you are. Be not confused about it. When the ballot comes out, we are going to count. And 100 percent. Not 99 percent of the votes cast. Not 90 percent of the votes cast. Any man south of Madison Street who casts a vote in the February 24th election who doesn't cast a vote for Harold Washington ought to be hung as those were hung in New York.

On February 23, 1987, Petitioner received a letter from respondent Robert P. Cummins, the chairman of the Illinois Judicial Inquiry Board. The letter enclosed a copy of the transcript of Petitioner's speech and stated that the Judicial Inquiry Board was considering charges that his participation in and remarks at the Saturday Forum constituted political activity in violation of the Illinois Code of Judicial Conduct, specifically Illinois Supreme Court Rules 62, 67 (A)(2), 67 (A)(4) and the introductory paragraph to Rule 61. In addition, the letter informed Petitioner that, prior to the Judicial Inquiry Board's determination of whether there existed a reasonable basis to file a complaint against him, he was required to appear and respond to the charges before the Judicial Inquiry Board on March 13, 1987.

Petitioner, accompanied by counsel, appeared before the Judicial Inquiry Board on that date. He called a number of witnesses and testified on his own behalf. Both he and his lawyers then argued that his speech did not violate Illinois Supreme Court Rules 61, 62, 67(A)(2) and 67(A)(4) and that if the rules were construed to prohibit his speech, they would violate his right to free speech and his right to be free from vague restrictions on speech, rights guaranteed by the first and fourteenth amendments. They urged that the Judicial Inquiry Board would thus be acting without a reasonable basis were it to file a complaint with the Courts Commission. Petitioner subsequently submitted a written memorandum of authorities in support of his position to the Judicial Inquiry Board.

In June 1987, Petitioner filed suit in the United States District Court for the Northern District of Illinois, seeking to enjoin the Judicial Inquiry Board from filing or proceeding upon any complaint against him premised on his January 31, 1987 speech. The Board voluntarily agreed to forego the filing of a complaint with the Courts

Commission until after the district court had an opportunity to consider a motion to dismiss based primarily on the doctrine of abstention. The respondents moved to dismiss the complaint, arguing that the suit was not ripe for determination because Petitioner had not yet been found guilty of a violation and disciplined, that the court should abstain under the principles of federalism and comity enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and that abstention was required under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The district court held that the case was ripe for adjudication, but granted the motion to dismiss on the basis of the *Younger* doctrine. *Pincham v. Judicial Inquiry Bd.*, 681 F. Supp. 1309 (N.D. Ill. 1988).

The Seventh Circuit affirmed, agreeing that *Younger* required the district court to abstain from enjoining the state judicial disciplinary proceedings against Petitioner. *Pincham v. Illinois Judicial Inquiry Bd.*, 872 F.2d 1341, 1351 (7th Cir. 1989).

Following the district court's dismissal of the complaint, the Judicial Inquiry Board filed a complaint before the Courts Commission against Petitioner based on his participation in the Saturday Forum. *See* App. A. Petitioner moved to dismiss the complaint, again arguing that proceedings violated his first amendment rights. Petitioner submitted a written brief and the Courts Commission heard oral argument on this issue. *See* Apps. B, C, and D. Petitioner's motion is currently under advisement.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Failed To Establish Any Special Or Important Reasons For Granting A Writ Of Certiorari In This Case.

Petitioner fails to establish the existence of any "special or important reasons" suggesting that this Court should grant his petition and exercise discretionary jurisdiction over this case. *See* U.S.S.Ct.R. 17.1.

The Seventh Circuit's decision, affirming the district court's decision to abstain under the principles of federalism and comity enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), did not conflict with the decision of any other federal court of appeals or with that of

the highest court of any state. Nor did the court of appeals address any novel or unsettled issues of federal law. This Court has fully set forth, in *Younger* and in more recent decisions such as *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) and *New Orleans Public Service Inc. v. Council of New Orleans*, ____ U.S. ___, 109 S.Ct. 2506 (1989), the analysis for courts to follow in determining whether principles of federalism and comity require abstention.

Petitioner contends that the Seventh Circuit misapplied *Younger* and its progeny, implying that the Court of Appeals thereby created a conflict with the applicable decisions of this Court. In fact, the Seventh Circuit's decision was fully consistent with the principles set forth in *Younger* and other decisions of this Court.

II. The Seventh Circuit Correctly Applied Settled Principles Of Law.

The Seventh Circuit's decision was eminently correct. In *Younger*, the plaintiff filed suit in federal court seeking to enjoin a state criminal prosecution against him on the ground that the statute under which he was being prosecuted violated his first and fourteenth amendment rights to free speech and press. 401 U.S. at 38-39. A three-judge district court found the state statute to be unconstitutional and enjoined the prosecution. *Id.* at 40. This Court reversed, holding that the district court should have abstained from enjoining the state court proceeding. *Id.* at 41.

The *Younger* court's "far-from-novel holding" was based partly on traditional principles of equity, but rested "primarily on the 'even more vital consideration' of comity." *New Orleans Public Service, Inc. v. Council of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 2515-16 (1989) (quoting *Younger*, 401 U.S. at 44). The notion of comity means

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44.

Although *Younger* involved the issue of federal court intervention in state criminal prosecutions, the doctrine has since been extended to cover other actions where important state interests are at stake. *See, e.g., Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1 (1987) (state court civil judgment enforcement proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc.*, 477 U.S. 619 (1986)(state administrative civil rights proceedings); *Moore v. Sims*, 442 U.S. 415 (1979) (state proceedings regarding child abuse).

This Court applied the *Younger* abstention doctrine in circumstances remarkably similar to those present here in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). In *Middlesex*, the issue was whether a federal court should abstain from considering a challenge to the constitutionality of attorney disciplinary rules that were the subject of a state disciplinary action. *Id.* at 425. This Court stated:

> The question . . . is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 432. The Seventh Circuit correctly held that these three inquiries set forth the proper analysis for determining whether *Younger* requires abstention in this case. *See* 872 F.2d at 1346. Furthermore, the Court of Appeals correctly applied this analysis to the facts of this case.

First, the judicial disciplinary proceedings against Petitioner were clearly ongoing state judicial proceedings. *Id.* The Courts Commission, the body that would hear the charges against Petitioner, is judicial in nature, as it is a duly constituted entity that rules upon alleged violations of Illinois Supreme Court rules, subject to procedural limitations like those found in courts. The proceedings before the Courts Commission are coercive, rather than remedial in nature. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc.*, 477

U.S. 619, 623-25, 626-29 (1986). Furthermore, the proceedings were clearly "ongoing", as Petitioner had presented a legal argument in response to the Judicial Inquiry Board's proposed charges and the Inquiry Board had determined to file a complaint. *See* 681 F. Supp. at 1320.

Second, the state judicial disciplinary proceedings brought against Petitioner involve an important state interest: preserving a fair and impartial judiciary. In *Middlesex*, this Court found that the State of New Jersey had "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." 457 U.S. at 434. A state's interest in assuring the integrity and professional conduct of its judiciary is certainly at least as important as its interest in assuring the professional conduct of the attorneys it licenses. *Coruzzi v. New Jersey*, 705 F.2d 688, 691 (3d Cir. 1983).

Third, the Seventh Circuit properly concluded that Petitioner had the opportunity to raise his constitutional challenges in the state judicial disciplinary proceedings. The burden rested on Petitioner to show that state procedural law barred presentation of his constitutional claims. *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987). Petitioner failed to establish facts that demonstrated that the Courts Commission would decline to entertain his constitutional questions. 872 F.2d at 1348. The Courts Commission has considered a constitutional challenge to the application of the Supreme Court rules to a judge on at least one previous occasion. *See In re Elward*, 1 Ill. Cts. Comm. 114 (1974), *cited in Pincham*, 872 F.2d at 1348. Furthermore, the Courts Commission is comprised of judges sworn to uphold the Constitutions of Illinois and the United States; the Commission rules provide that Petitioner could raise challenges, including constitutional challenges, in his pleadings responsive to the complaint; the two Illinois Supreme Court cases discussing the jurisdiction of the Commission make clear that it does have jurisdiction to consider constitutional challenges to complaints; and acceptance of Petitioner's interpretation of the Courts Commission's jurisdiction defies common sense and would render the Illinois judicial disciplinary system meaningless.

Whatever doubt may have existed as to Petitioner's ability to raise constitutional challenges in the judicial disciplinary proceedings were laid to rest by the subsequent actions of the Courts Commission.

As previously noted, Petitioner raised his first amendment and other constitutional challenges to the complaint, filing briefs and making arguments before the Courts Commission. *See* Apps. C, D. The Commission entertained all of Petitioner's constitutional claims and they are now under advisement. *See* App. B. Petitioner therefore has had "abundant opportunity to present his constitutional challenges in the state disciplinary proceedings." *Middlesex*, 457 U.S. 436-37 (New Jersey Supreme Court's *sua sponte* consideration of constitutional issues prior to filing of petition for certiorari clearly demonstrated adequacy of state forum).

Finally, no exceptions to the application of the *Younger* doctrine exist. Although Petitioner argues that the disciplinary proceedings against him constitute selective prosecution, he failed to allege specific facts to support an inference of bad faith or harassment. *See Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986)(citing *Hicks v. Miranda*, 422 U.S. 332 (1975)), *cert. denied*, 483 U.S. 1005 (1987). Petitioner did not allege that the Judicial Inquiry Board or the Courts Commission was aware of other judges' activities, but nevertheless treated those judges more favorably or that the respondents were using the proceedings against Petitioner, regardless of outcome, as instrumentalities to suppress speech.

Nor did Petitioner establish an "extraordinarily pressing need for immediate equitable relief." This Court in *Younger* expressly rejected the argument that the presence of first amendment issues and the possibility of a "chilling effect" on free speech, in and of itself, provide a sufficient basis for prohibiting state action. *Younger*, 401 U.S. at 51.

Finally, Petitioner did not show that the Illinois Supreme Court Rules were "flagrantly and patently violative of express constitutional prohibitions . . . . in whatever manner and against whomever an effort might be made to apply it." *See Younger*, 401 U.S. at 53-54. By arguing to the Judicial Inquiry Board that the rules did not prohibit his speech, Petitioner conceded that the rules could be construed in a manner compatible with the Constitution.

Accordingly, the well-settled precedent of *Younger* controls. Thus, Petitioner has put forth no reason to justify the grant of a writ of certiorari in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

Appendix A

STATE OF ILLINOIS
COURTS COMMISSION

In Re JUSTICE R. EUGENE PINCHAM	)	
of the	)	87 CC 3
APPELLATE COURT OF ILLINOIS	)	

COMPLAINT

Pursuant to the provisions of Section 15(c) of Article VI of the Constitution of the State of Illinois, the Illinois Judicial Inquiry Board ("the Board"), complains against R. Eugene Pincham ("Respondent"), a Justice of the Appellate Court of Illinois, and charges Respondent with conduct that is prejudicial to the administration of justice and that brings the judicial office into disrepute.

Summary of Allegations

Respondent R. Eugene Pincham is a Justice of the Appellate Court of Illinois, First District. This complaint charges Justice Pincham with engaging in political activity in violation of the Standards of Judicial Conduct as set forth in the Illinois Supreme Court Rule 67.

Allegations

1. On January 31, 1987, Respondent gave a speech at a regularly scheduled "Saturday Forum" of Operation PUSH, a Chicago-based organization that advocates civil rights. Respondent was the keynote speaker (a copy of Respondent's speech is attached hereto as Exhibit B).

2. The program was held at the Operation PUSH headquarters in Chicago, but was broadcast over three Chicago-area radio stations and one station from Des Moines, Iowa.

3. The Operations PUSH program focused on the re-election of Harold Washington as mayor of Chicago. It began with an announcer stating:

> Today we come again appealing to you. Join us here at America's most happy crisis hot line. We call upon you to join us as we again engage on a crusade to re-elect the mayor of our city, Mayor Harold Washington, not because of him alone but because it is our time, because he has done an excellent job, because we are joining him in an attempt to turn this city around and we want his work to continue, this is a day in Black History Month, because we shall overcome today . . . Let us march on February 24th [the date of the Chicago mayoral primary] 'til victory is won.

(A copy of the transcript of the program excluding Respondent's speech is attached as exhibit A.) Throughout the program, various speakers urged the audience to support Harold Washington's candidacy for mayor of Chicago.

4. Four persons spoke to PUSH's audience prior to Judge Pincham's speech and each of those speakers urged support for Mayor Harold Washington's candidacy.

5. For example, prior to Judge Pincham speaking, a Mr. Tracy Powell urged the audience to attend a "giant rally fund raiser for Mayor Washington" which was to be held at the Americana Congress Hotel at 6:30 p.m. on February 6, 1987. (Ex. A, page 3.) He also urged the young people in the audience to "help us in this effort to re-elect Mayor Harold Washington." (Ex. A, page 4.)

6. Further, prior to Judge Pincham speaking, a Dr. Willie Chaplan Barrow stated "Let us march on 'til victory is won and victory is going to be won for Harold Washington February 24th no matter what happens. We [sic] going to win." (Ex. A, page 6.) Dr. Barrow then urged the audience to attend three rallies for Harold Washington on February 1, 1987 at the Grand Memorial Church, February 16, 1987 at the University of Illinois Pavilion, and February 9, 1987 at the Hyatt Hotel. (Ex. A, pages 7, 8, 11.)

7. Respondent's speech discussed advances made by blacks in civil rights and politics. Part of his speech discussed the hanging of several slaves and white collaborators during the New York slave rebellion of 1741.

8. Respondent's speech also discussed the then upcoming Chicago mayoral primary election. During the course of his speech he made the following statement:

> Harold Washington is running for Mayor of the City of Chicago. And he got here on our shoulders. You've got to decide here and now whether or not your shoulders are broad enough to carry him in another time . . .
>
> And those of us who might be inclined to be traitors — you see, there are still some who have slave mentalities — those of use who are inclined to be traitors, who suspect that because you go into the secrecy of a voting booth that you can vote for who you want to vote for we know who you are. And be not confused about it. When the ballot comes out, we're going to count, and 100 percent, not 99 percent of the votes cast, not 90 percent of votes cast. Any man south of Madison Street who cares to vote in the February 24th election who doesn't vote for Harold Washington ought to be hung as those were hung in New York.

(Ex. B, pages 27, 28.)

9. The above-described conduct of Respondent violates *inter alia* Illinois Supreme Court Rule 67(A)(2)(1987), which provides, "a judge may not, except when a candidate for office or retention, participate in political compaigns or activities, or make political contributions."

10. The above-described conduct of Respondent violates *inter alia* Illinois Supreme Court Rule 67(A)(4), which provides, "a judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice."

WHEREFORE, the Board, charging that the above-described conduct of Respondent prejudices the administration of justice and brings the judicial office into disrepute, prays that the Illinois Courts Commission, after notice and public hearing, make such order in

accordance with Section 15 of Article VI of the Illinois Constitution as the Commission may deem appropriate.

Respectfully submitted,

ILLINOIS JUDICIAL INQUIRY BOARD

_____

Robert P. Cummins, Chairman

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Appendix B

STATE OF ILLINOIS
COURTS COMMISSION

In Re
JUSTICE R. EUGENE PINCHAM)
OF THE) No. 88 CC 1
APPELLATE COURT OF ILLINOIS)

NOTICE OF HEARING AND ORDER

Please take notice that all legal issues presented by the pleadings in the above-captioned cause will be heard by the Illinois Courts Commission in the courtroom usually occupied by the Supreme Court of Illinois at the Supreme Court Building in Springfield, Illinois beginning at 10 a.m. on Monday, August 28, 1989.

The Illinois Judicial Inquiry Board and the respondent, Justice R. Eugene Pincham, are ordered and directed to file with the clerk of the Illinois Courts Commission all additional motions to be heard in this cause on or before Monday, August 21, 1989. All additional motions filed in this cause will be heard by the Illinois Courts Commission in the courtroom usually occupied by the Supreme Court of Illinois at the Supreme Court Building in Springfield, Illinois on Monday, August 28, 1989, immediately following the hearing on the legal issues presented by the pleadings now on file in this cause.

ENTER: , 1989

/s/
Illinois Courts Commission
By: Ben Miller, its Chairman

Appendix C

STATE OF ILLINOIS
COURT'S COMMISSION

IN RE:
JUSTICE R. EUGENE PINCHAM,)
) NO. 88-CC-1
Of the Appellate Court of Illinois)

MOTION TO DISMISS COMPLAINT BECAUSE RULES 67A(2) AND 67A(4) OF THE RULES OF THE ILLINOIS SUPREME COURT, ILLINOIS REVISED STATUTES, 1987, CHAPTER 110A, SECTIONS 67A(2) AND 67A(4) ARE *FACIALLY* UNCONSTITUTIONAL AND UNCONSTITUTIONAL *AS APPLIED* TO RESPONDENT.

MOTION FOR EVIDENTIARY HEARING ON MOTION TO DISMISS

Now comes JUSTICE R. EUGENE PINCHAM, Respondent, by counsel, and moves the Court's Commission to enter an order dismissing the instant complaint on the grounds that Rules 67A(2) and 67A(4) of the Rules of the Illinois Supreme Court are facially unconstitutional and unconstitutional as applied to Respondent, and further moves the Court's Commission for an evidentiary hearing thereon.

In support of the instant Motions Respondent states as follows:

I.

FREEDOM OF SPEECH AND ASSEMBLY

Rules 67A(2) and 67A(4) of the Rules of the Illinois Supreme Court provide as follows:

A(2) A Judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions.

* * *

A(4) A Judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

The above rules are unconstitutional both on their face and as applied to Respondent, Justice Pincham, under both the Constitution of the United States of America and the Constitution of the State of Illinois in that:

(A) The above rules violate both on their face and as applied to Respondent the freedom of speech and freedom of assembly guarantees of the First Amendment to the United States Constitution binding upon and applicable to the states through the due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(B) The above rules violate both on their face and as applied to Respondent the freedom of speech guarantee to citizens of Illinois by Article I, Section 4 of the Constitution of the State of Illinois.

(C) The above rules violate both on their face and as applied to Respondent the right to assemble and petition guarantee of Article I, Section 5 of the Constitution of the State of Illinois.

II.
DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW

The above rules are unconstitutional both on their face and as applied to Respondent under both the Constitution of the United States and the Constitution of the State of Illinois in that:

(A) The above rules violate due process of law and the equal protection of the laws both on their face and as applied to Respondent under both the United States Constitution, Amendment 14, and the Constitution of the State of Illinois, Article I, Section 2, in that the

above rules are vague, indefinite, uncertain, and overbroad. The above rules do not give adequate notice and/or fair warning to members of the Illinois Judiciary in general and/or to this Respondent in particular as to what conduct is allegedly prohibited or sought to be prohibited.

III.

MOTION FOR EVIDENTIARY HEARING

Respondent, Justice R. Eugene Pincham, moves the Commission for an evidentiary hearing whereby Respondent will demonstrate through live testimony and/or documentary and demonstrative evidence each of the above propositions.

Respectfully submitted,

R. EUGENE PINCHAM, Respondent

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Appendix D

STATE OF ILLINOIS
COURT'S COMMISSION

IN RE: R. EUGENE PINCHAM,	)	
	)	NO. 88-CC-1
of the Appellate Court of Illinois	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT BECAUSE RULE 67A(2) AND 67A(4) OF THE RULES OF THE ILLINOIS SUPREME COURT ARE FACIALLY UNCONSTITUTIONAL AND UNCONSTITUTIONAL AS APPLIED TO RESPONDENT, AND IN SUPPORT OF MOTION FOR EVIDENTIARY HEARING ON MOTION TO DISMISS.

In support of the instant motion Respondent states as follows:

A.

The United States Constitution, Amendment I, guarantees freedom of speech. It is undisputed that Respondent is a Justice of the Illinois Appellate Court. It is also undisputed that at the time when Respondent is alleged to have violated Rules 67A(2) and 67A(4) Respondent was not in a courtroom, nor wearing the trappings of his office, nor speaking as a justice or a judge, but, instead, was engaged in speaking to a community interest group on a Saturday morning not in or near any courtroom or even on public property. Nor is it alleged that Respondent did anything other that make a speech.

There is a real question as to whether the Rules were even intended by the Illinois Supreme Court to apply to speech per se. This is because in drafting the rules the court specifically proposed for adoption of Canon 7(a)(1)(b) of the American Bar Association providing:

"(1) A judge *** should not:

(b) make speeches for a political organization or publicly endorse a candidate for public office."

But the court rejected proposed Canon 7(a)(1)(b) and prohibited only "political activity" by Rules 67A(2) and 67A(4).

Now, it seems too obvious to belabor that "speech" and "activity" are not the same thing at all. True, certain "activity" may constitute symbolic speech. Compare *Texas v. Johnson* (1989), 109 S. Ct. 2533. True, certain speech may arouse or induce "activity". Compare *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568. True, the utterance of certain specific and well-defined words themselves may be prohibited under certain specific and well-defined circumstances. Compare *Roth v. United States* (1957), 554 U.S. 476; *Sheneck v. United States* (1919), 249 U.S. 47. But in common every day custom and usage, men and women of ordinary and reasonable intelligence know that "activity" and "speech" are not the same thing. The State of California tried to equate "conduct" and "speech" in order to prevent Mr. Cohen from displaying "Fuck the Draft" openly on his jacket, but Mr. Justice Harlan taught us that "The 'conduct' which the state sought to punish is the fact of communication. Thus, we deal here with a communication resting solely upon 'speech'. . . Further the state lacks power to punish Cohen for the underlying content of the message the inscription conveyed." *Cohen v. California* (1971), 403 U.S. 15, 18. One need not be an etymologist to discern that "conduct" and "activity" are, or are pretty close to being, synonymous. But if "conduct" and "speech" are not legally identical (*Cohen*), it strains the imagination to conclude that "activity" and "speech" are.

Thus, Respondent urges that the Illinois Supreme Court intended to prohibit only political "activity" by Illinois judges, and not mere speech.

B.

Respondent next urges that even if the Illinois Supreme Court did intend to prohibit free political speech, it lacked the constitutional authority to do so by these Rules. Making the necessary assumptions, these Rules constitute a prior restraint on speech. Prior restraints on

speech, presumed to be unconstitutional, can only be upheld if the state establishes (1) the speech sought to be restrained either poses a clear and present danger or a serious or imminent threat to a protected competing interest, *Wood v. Georgia* (1962), 370 U.S. 375, 383-85; (2) the order, rule, statute or regulation is narrowly drawn, *Carroll v. President and Commissioners of Princess Anne* (1968), 393 U.S. 175, 183-84; and that (3) less restrictive alternatives are not available. *Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 563. And because these Rules are content-based, i.e. they purport to regulate a specific subject matter (politics), see *Consolidated Edison of New York v. Public Service Commission* (1980), 447 U.S. 530, 537, and a certain category of speakers (judges), see *Widmar v. Vincent* (1981), 454 U.S. 263, 267-70, only the least restrictive means may be employed. *Cornelius v. N.A.A.C.P. Legal Defense and Educational Fund, Inc.* (1985), 473 U.S. 788, 800.

Respondent urges that the Inquiry Board has not even sought to establish (much the less succeeded) the existence of *any* of the above criteria. What clear and present danger was posed by Respondent's speech? What serious and imminent threat to a competing interest existed? Were these Rules narrowly drawn? Were less restrictive alternatives available? The answer to each of these questions is obvious. There was no clear and present danger and certainly no serious and imminent threat to a competing interest. It is difficult to imagine how these Rules could be more broadly (less narrowly) drawn (see "C" infra). Alternative means were never explored or, apparently, even contemplated by the Illinois Supreme Court.

The Rules must fall on their own weight, assuming they were meant to restrain (prohibit) free political speech. Because we remember that

> ". . . if it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people' *Roth v. United States*, 354 U.S. 476-484, then it can hardly be doubted that constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political of-

fice." *Monitor Patriot Company v. Roy* (1971), 401 U.S. 265.

We must remember, too, that "policemen (read "judges") like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey* (1967), 385 U.S. 493, 500.

Rules having similar goals have been enacted. And they have been struck down under the First Amendment. See e.g. *In re Oliver* (7th Cir., 1971), 452 F. 2d 111 (blanket prohibition against attorney comments in pending litigation); *Daily Herald Company v. Munro* (1988), 838 F. 2d 38 (prohibition on media from conducting "exit polls" during an election); *Smith v. Butterworth* (11th Cir., 1989), 866 F. 2d 1318 (prohibition against disclosure of one's own grand jury testimony after completion of the investigation); *O'Brien v. Town of Caledonia* (7th Cir., 1984), 748 F. 2d 403 (police regulation prohibiting officers' discussion of graft and corruption in the department); and, of course, *Bates v. State Bar of Arizona* (1977), 433 U.S. 350 (local Bar rule prohibiting attorney advertising).

C.

Even if the Court's Commission were to conclude that the Illinois Supreme Court intended by Rules 67A(2) and 67A(4) to prohibit political speech, and were to further conclude that the Illinois Supreme Court had the authority to do so, still, these Rules are so vague, indefinite, uncertain and overbroad as to be lacking in fundamental due process. Judges in general, and Respondent specifically, are not given fair notice by these Rules as to what, and particularly what speech, is prohibited. To cite Respondent for a violation of these Rules after the fact violates the *ex post facto* prohibition of the United States Constitution, Article I, Section 9, Clause 3. Compare *Bowie v. City of Columbia* (1964), 378 U.S. 347.

It is a self-evident principle of constitutional law as well as fundamental fairness that every person be given advance notice as to what "activity" will violate the law. If men of common intelligence must necessarily guess as to whether this "activity" or that "activity" does or does not cross the plemsoll line between the prescribed and

the proscribed, then the law or rule is vague and violative of due process. It is as simple as that. Every person is entitled to be informed *beforehand* as to what the State commands or forbids. *Connally v. General Construction Company*, 269 U.S. 385, 391; *Lanzetta v. New Jersey*, 306 U.S. 451, 453; *Grayned v. City of Rockford* (1972), 408 U.S. 104. See also *People v. Klick* (1977), 66 Ill. 2d 269. In no other area of the law is this fundamental principle as essential as in the arena of free speech. This is, of course, because none of us has the right to commit burglary, robbery, murder etc. But we all do have the right of speech, and therefore if an instrument of the State seeks to prohibit certain speech, it must do so with the very utmost of precision. And that's the point here, assuming the Rules were intended to prohibit pure speech. What does "political activity" mean? May a judge attend a cocktail party for a public official? What about one for an aspiring public official? Can he attend the inaugural of the Governor? Can he meet the President? The list of questions is endless. Even these hypotheticals which clearly involve "activity" are not answered by any case law. But when we go one step further into the arena of speech we truly enter the abyss of the amorphous. Is a judge permitted to say to his wife, "I urge you to vote for candidate X"? What about to his neighbor? What about to five neighbors? What about to a block club consisting of 250 neighbors? etc. The point of all this, of course, is that if there is a cut-off point, the judge must be advised of it *in advance*.[1]

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1 In the Tuesday, September 5, 1989 edition of the *Chicago Tribune*, Section 2, page 3, "On The Law" column, the columnist seems to suggest that a self-styled "'father-confessor' to judges", Professor Steven Lubet of Northwestern Law School, has set up shop as some sort of clearinghouse for judges who are "in trouble", about to be "in trouble", or "want to do" something and seek permission to do it so as to avoid being "in trouble." (See article attached hereto as Exhibit). When a Professor of Law at a most respected leading university purports to advise judges on everything from speech to nude bathing this demonstrates better than anything Respondent can say in this brief the utter futility of attempting to conform one's "activity" (read "speech") to the unstated "requirements" of ill-defined Rules. *See e.g.*

The case law makes plain that governmental rules and regulations purporting to prohibit certain governmental employees from exercising their First Amendment rights of free speech must meet the requirements of exactitude or be struck down as vague and/or overbroad. See e.g. *Muller v. Conlist* (7th Cir., 1970), 429 F. 2d 901 (holding police department rules prohibiting policemen from discussing matters derogatory to the department were overbroad); *Chicago Council of Lawyers v. Bauer* (7th Cir, 1975), 522 F. 2d 242 (holding District Court rules relating to extrajudicial comment by attorneys engaged in criminal litigation were unconstitutionally vague and overbroad) ; *Gasparinetti v. Kerr* (3rd Cir., 1989), 568 F. 2d 311 (holding that police department regulations prohibiting public comments of disparagement of superior officers were vague and overbroad); *Levine v. United States District Court for the Central District of California* (9th Cir., 1985), 764 F. 2d 590 (holding that rules restraining attorneys involved in litigation from communicating with the media about the merits of the case were overbroad); *United States v. Ford* (6th Cir., 1987), 830 F. 2d 596 (holding "gag" order restricting comments by defendant-congressman in federal criminal trial was overbroad).

D.
CONCLUSION

Respondent respectfully submits that (a) the Supreme Court never intended by the enactment of Rules 67A(2) and 67A(4) to prohibit political "speech" as distinguished from political "activity"; (b) that if the Supreme Court did intend to prohibit speech within the rubric of "political activity", the Rules run afoul of the First Amendment guarantee to free speech and the Fourteenth Amendment guar-

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footnote 1 cont'd

In re Luster (1957), 12 Ill. 2d 25; *In re Friedman* (1979), 76 Ill. 2d 392; *In re Corboy* (1988), 124 Ill. 2d 29. Please note that *Luster*, *Friedman* and *Corboy* all involve conduct, i.e. "activity", and not speech, and, in the case of *Friedman*, *minimal* conduct.

antee to notice and are therefore unconstitutional facially and as applied to Respondent.

Respectfully submitted

/s/
Justice R. Eugene Pincham, Respondent

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